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ABORTIVE REASONS AND OBSCENE STANDARDS: A COMMENT ON THE ABORTION AND OBSCENITY CASES

ARNOLD H. LOEWY†

The 1972 term of the Supreme Court was certainly not devoid of outstanding opinions.¹ Thus, it is regrettable that the term will be remembered best for two of the most unfortunate series of decisions in recent years — the abortion cases² and the obscenity cases.³ Not only were these cases wrongly decided in the abstract, but when juxtaposed together, they reflect a strangely convoluted concept of constitutional values for the Supreme Court to be espousing.⁴

ABORTION CASES

Like most things which turn out wrong, including the proverbial "road to hell", *Roe v. Wade*⁵ and *Doe v. Bolton*⁶ are paved with good intentions. The emotional impact of a woman with an unwanted pregnancy can be strong indeed. Thus one can appreciate and indeed be grateful for the humanitarian instincts that undoubtedly impelled the Court to hold that (1) during the first trimester of pregnancy, the State may not interfere with the judgment of a patient and her medical doctor⁷ in regard to the abortion decision, (2) during the second trimester, the State may interfere only to the extent of licensing the abortion facility

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¹It is probably too early to assess which opinions will ultimately be entitled to this accolade. In my opinion, some likely candidates include Mr. Justice Powell's opinion for the Court in *Chambers v. Mississippi*, 410 U.S. 284 (1973), both Powell's opinion for the Court and Mr. Justice Marshall's dissent in *San Antonio Independent School Dist. v. Rodriguez*, 93 S. Ct. 1278, 1315 (1973), and Marshall's dissent in *United States v. Kras*, 409 U.S. 434, 458 (1973). Mr. Justice Brennan's dissent in *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2642 (1973), which is one of the subjects of this article, may well have been the best opinion of the entire term.

²*Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

³*Miller v. California*, 93 S. Ct. 2607 (1973); *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628 (1973); *United States v. 12-200 Ft. Reels of Super 8 MM. Film*, 93 S. Ct. 2665 (1973); *United States v. Orito*, 93 S. Ct. 2674 (1973); *Kaplan v. California*, 93 S. Ct. 2680 (1973).

⁴See text accompanying notes 108-11 *infra*. In fairness to the whole Court, it should be noted that only Chief Justice Burger and Justices Blackmun and Powell were with the majority in both cases.

⁵410 U.S. 113 (1973).

⁶410 U.S. 179 (1973).

⁷The question of paternal rights, if any, was explicitly left open, *Roe v. Wade*, 410 U.S. 113, 164 n.67 (1973).

and the abortionist, and (3) during the third trimester, abortion may be prohibited except where necessary to protect the life or health of the mother. Humanitarianism, however, important as it is, cannot replace analysis nor justify misanalysis if the Court is to be worthy of the respect that traditionally has been accorded to it.

Roe begins hopefully enough:

Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection. We seek earnestly to do this We bear in mind, too, Mr. Justice Holmes' admonition in his now vindicated dissent in *Lochner v. New York*: "It [the Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."⁸

The first step in the Court's analysis was to categorize a pregnant woman's abortion decision as part of her fundamental right to privacy, thereby requiring "a compelling state interest" to justify impinging upon it. This was obviously an important step because it effectively shifted the burden of establishing constitutionality to the state rather than according the statute the usual presumption of constitutionality. And, of course, the term "compelling" can be a well-nigh insuperable burden when the Court wants it to be.⁹ Yet, whatever may be said about the fundamental nature of the decision to have an abortion, it seems difficult to believe that the right to privacy has anything to do with it.¹⁰ Quite simply, abortions are not performed in private. They are performed in places in which the public has an interest, such as hospitals, clinics, or maybe doctors' offices, but surely not in the privacy of one's home.¹¹ Furthermore, the very essence of a privacy claim would seem

⁸*Id.* at 117, quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905).

⁹*See, e.g., New York Times v. United States*, 403 U.S. 713 (1971). *But cf. United States v. O'Brien*, 391 U.S. 367 (1968).

¹⁰At one point, the Court seems to say as much: "In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions." 410 U.S. at 154. *See also Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929-33 (1973).

¹¹At least not legal abortions. Although it is possible to read *Doe v. Bolton* as forbidding an anti-home regulation as the locus of abortion during the first three months. Maybe the Court means that the right to abortion is necessary in that the future quality of one's sex life is dependent upon one's obtaining an abortion. If that is the Court's theory, it is not clearly articulated.

to suggest that the activity for which protection is sought be victimless.¹² Thus, for a privacy claim to be sustained, it is not only necessary for the Court to conclude that an under six month embryo or fetus is not a human being, but that it cannot even be permitted to attain the status of a victim.¹³

Because a fundamental right to an abortion cannot be established from the right to privacy, however, does not mean that such a right cannot be established at all. Probably, the fundamental right to procreate¹⁴ does or should include the right not to procreate, particularly in view of *Griswold v. Connecticut*.¹⁵ Hence, it is arguable that the right to abortion is included within this non-procreative right. Though sounder than the Court's analysis, this argument is also shaky because of the very real difference between the right not to create (non-procreation) and the right to destroy (abortion). Once conception has occurred a new entity, whether human or not,¹⁶ has been produced and things simply are not as they once were. As Mr. Chief Justice Marshall said in another context many years ago: "The past cannot be recalled by the most absolute power."¹⁷

Furthermore, it seems inconsistent with *United States v. Orito*, 93 S. Ct. 2674 (1973); see note 12 *infra*.

¹²Even where the crime is victimless, the Court has been in no hurry to extend the right to privacy. It turned down an opportunity to constitutionalize the right to fornication in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). And in *United States v. Orito*, 93 S. Ct. 2674 (1973), it held that the right to view obscenity in the privacy of one's home does not extend to the right to transport such film in interstate commerce.

¹³Of course, not all victims of crime are human beings. See Ely, *supra* note 10, at 926. Dogs and cats are protected under cruelty to animals statutes and flags are protected under flag desecration statutes, (see *Cowgill v. California*, 396 U.S. 371 (1970)) despite first amendment arguments that seem to me to be compelling. See Loewy, *Punishing Flag Desecrators: The Ultimate In Flag Desecration*, 49 N.C.L. REV. 48 (1970). Although one might argue that cruelty to animals statutes exist to protect people's feelings about animals rather than the animals themselves, there would seem to be no basis for assuming that the average citizen feels more strongly about animals than he (or she) does about fetuses.

¹⁴At least arguably established by *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹⁵381 U.S. 479 (1965) (holding the right of marital use of contraceptive devices to be constitutionally protected), discussed at text accompanying notes 51-57 *infra*.

¹⁶At minimum, it is an organism with a full set of human genes. See text accompanying notes 26-28 *infra*.

¹⁷*Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). This is a complete answer to Mr. Justice Clark's question: "If an individual may prevent conception, why can he not nullify that conception when prevention has failed?" Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A.L. REV. 1, 9 (1969). It is also a complete answer to Professor Heymann and Attorney Barzelay who contend that "[t]he couple's right to decide whether to have a family [in the abortion context] is the very same right as that established and protected in the cases dealing with contraception. . . ." They argue that the only difference between *Roe* and *Griswold* is "the asserted state

Once it determined that abortion was a fundamental right, the Court's reasoning went from bad to worse. After concluding (correctly in my opinion) that a fetus is not a "person" within the meaning of the fourteenth amendment,¹⁸ the Court turned to the State's argument that "apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception."¹⁹ The Court's response begins in a manner calculated to make one believe that it really had remembered the "now vindicated dissent in *Lochner v. New York*"²⁰ and in classic Holmesian language wrote:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.²¹

From this, the reader would naturally assume that the statute would be sustained²² since he surely must suppose that the Court is not about to deny the State's right to preserve what it considers human life in the absence of an authoritative determination that that which is being protected is something other than human life. However, with a startling piece of legal legerdemain, sadly reminiscent of the New Deal Court's invalidation of the first Agricultural Adjustment Act,²³ the Court op-

interest" in *Roe*. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765, 775 (1973). By that reasoning, I suppose one could argue (although Heymann and Barzelay do not) that couples have a fundamental right to infanticide, limited only by the State's compelling interest in preserving the infant. All though the ultimate result in such a case (no constitutional right) is satisfactory, it seems inconceivable that any court would employ such a tortured analysis to reach its result. While I readily concede that killing an embryo or fetus is not the same thing as killing an infant (that's why it's called abortion rather than murder), it is also not the same thing as using a contraceptive device, and the fundamentality of one does not follow from the other.

¹⁸If a fetus were deemed a person for fourteenth amendment purposes, presumably abortion would have to be punished as severely as murder under the equal protection clause. Such a requirement seems as unreasonable as requiring the state to accord the fetus no rights at all. The extent to which fetal rights should approach personal rights should be determined by the various legislatures for the reasons presented in this article.

¹⁹410 U.S. at 159.

²⁰So categorized by *Roe*. See note 8 and accompanying text *supra*.

²¹410 U.S. at 159.

²²But for the fact that at the outset of the Court's opinion, he was told otherwise.

²³*United States v. Butler*, 297 U.S. 1 (1936), wherein the Court stated that it was adopting the broad Hamiltonian rather than the narrow Madisonian view of the Federal taxing power and then proceeded to invalidate the tax under the tenth amendment (which by its terms is applicable

ined: "In view of all this [the different theories of when life begins], we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."²⁴ Thus, we have the spectacle of the highest Court in the land telling a sovereign state that even though it may be correct that life begins at conception, that possibility is not sufficient to justify a law designed to protect this life. Surely Rufus Peckham (the author of *Lochner*) would have been prouder of this approach than Oliver Wendell Holmes.²⁵

Part of the tragedy of this faulty analysis is that it could have been avoided by focusing on points of agreement rather than disagreement. It is universally agreed²⁶ that from the moment of conception, the zygote (in its early stages called an embryo and later a fetus) is an organism with a full set of human genes and not merely something with the potential to develop into a live human being.²⁷ Had the Court recognized this uncontroverted fact, it would not have had to choose between allowing Texas to treat conception as the beginning of "life" on the one hand or merely a future interest on the other. Correct categorization of the State's interest, would have not only avoided the necessity of the Court's *Lochneresque* unwillingness to allow the State to choose which expert to believe, but, hopefully, would have caused it to find the State's interest sufficiently "compelling" to sustain the statute.²⁸

only where the Federal government is not empowered to act), thereby effectively adopting an approach more like that which it was purporting to reject than like one it was purporting to accept.

²⁴410 U.S. at 162.

²⁵"While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, . . . the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case." 410 U.S. at 171. (dissenting opinion of Rehnquist, J.). I do not purport to know the actual views of either Peckham or Holmes on the abortion issue, although in the latter's case, his personal views would have been irrelevant.

²⁶At least I have never heard of any disagreement on this point either in my role as counsel for the State in *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971), or as a participant with medical doctors on an abortion panel during a population workshop at the University of North Carolina at Charlotte.

²⁷"Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute." *Rosen v. Board of Medical Examiners*, 318 F. Supp. 1217, 1223 (E.D. La. 1970) citing H. GRAY, *ANATOMY OF THE HUMAN BODY* 21-60 (Goss 27th ed. 1959) and 5 *LAWYERS' MEDICAL CYCLOPEDIA* § 37.1 (1960).

²⁸After all, it held an interest in mere "potential life" from and after "viability" to be sufficiently "compelling." 410 U.S. at 163-64. Of course, there is the possibility that the Court would say that even an organism with a full set of human genes cannot be protected as a matter of constitutional law at the expense of a contrary maternal choice. Judge Newman so ruled, by defining the right to abortion as "a constitutional right of special significance," and applying, in effect, a super compelling state interest test. *Abele v. Markle*, 351 F. Supp. 224, 231 (D. Conn. 1972). Assuming, however, that the word "compelling" does not mean significantly more than it

Having concluded that the Court's opinion cannot withstand analysis, it seems appropriate to consider whether the same result could have been reached on other grounds. One potential ground noted, but not pursued, by the Court is that abortion statutes were not passed to protect embryonic or fetal life, but to prevent injury to the expectant mother.²⁹ For one supporting the unconstitutionality of abortion laws, this is an attractive argument. After all, once prenatal life is eliminated as an interest, the State's argument boils down to an interest in preventing an immediate surgical removal of a "benign uterine tumor" (which in the first three months is apparently safer than or at least as safe as childbirth)³⁰ in favor of "natural removal" up to nine months later, — an interest whose sufficiency is very doubtful, to say the least, in view of *Griswold*.³¹ Nevertheless, despite the surface attractiveness of this argument there are such serious deficiencies in it that it is to the Court's credit that it did not opt for this easy way out. First of all, there is substantial disagreement as to the original purpose of the abortion laws.³² Secondly, even if the original purpose of a statute is no longer operative or permissible, the Court ought not to invalidate a statute for that reason when other justifications provided present day vivification. Certainly that was the Court's position in *McGowan v. Maryland* where it sustained a Sunday closing law because of its present day secular justification, notwithstanding the religious motivation which had prompted its original passage.³³ Finally, it is hard to challenge Mr. Justice Black's observation for the Court in *Palmer v. Thompson* that

there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.³⁴

meant in *United States v. O'Brien*, 391 U.S. 374, 377-78 (1968) (a freedom of speech case), it is hard to understand how the State's interest in an organism with a full set of human genes could be less than "compelling."

²⁹410 U.S. at 149-50. The Court also alluded to but quite correctly dismissed the argument (made by none of the States) that a purpose of anti-abortion laws was "to discourage illicit sexual conduct."

³⁰See 410 U.S. at 149 n.44.

³¹*Griswold v. Connecticut*, 381 U.S. 479 (1965), discussed at text accompanying notes 51-57 *infra*.

³²Compare the concurring and dissenting opinions of Judges Newman and Clarie respectively in *Abele v. Markle*, 342 F. Supp. 800, 805, 812 (D. Conn. 1972).

³³366 U.S. 420, 446-49 (1961).

³⁴403 U.S. 217, 225 (1971). Indeed, this is precisely what was attempted in *Connecticut*, where

There is one other potential justification for *Roe* which may be the "real" reason for the Court's decision. That is, where the legislature balances two competing considerations in a manner which seems clearly wrong to a majority of the Court, it is the duty of that majority to reverse this imbalance through the due process clause. In response to this argument,³⁵ one can hardly resist Judge Learned Hand's cryptic rebuttal: "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."³⁶ Before concluding that *Roe* was wrongly decided, however, we should examine the "Platonic Guardian" theory more closely. After all, even Learned Hand wasn't right all of the time.³⁷

I suppose the "Platonic Guardian" approach would sit better if each individual were confident that his "platonic guardian" Justice would agree with him all (or at least, most) of the time. Yet, those who would be sublimely happy to have William Douglas as their "Guardian" surely must have qualms about casting that accolade upon William Rehnquist. Similarly those who would be confident with Mr. Justice Rehnquist would not be with Mr. Justice Douglas. This would seem to demonstrate that if Justices were intended to be "Guardians" they would almost certainly have been chosen in a more democratic manner than they are.³⁸ Fortunately, we do not have to rely entirely on theory. The 1905-1937 experiment with Platonic Guardianism provides ample proof of the incompatibility of this approach with the democratic pro-

on April 18, 1972, by a two to one decision, a Three-Judge Federal Court invalidated Connecticut's anti-abortion statute with one of the judges relying on the non-fetus protecting motive of the legislature. *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972). See especially the opinion of Newman, J., at 805. In a May special session, Connecticut passed a new anti-abortion statute declaring it to be the legislative intent "to protect and preserve human life from the moment of conception." The new statute was also invalidated. *Abele v. Markle*, 351 F. Supp. 224 (D. Conn. 1972), see note 28 *supra*.

³⁵This argument has been suggested to me with sufficient frequency to satisfy me that I am not creating a straw man. Some would limit this duty to those issues in which emotionalism runs so high as to render rational legislative judgment unlikely. My principal difficulty with this limitation (apart from the identity problem) is that deeply emotional issues which sharply divide the populace and to which no provision of the Constitution explicitly or by fair inference addresses itself, are precisely the issues upon which a Court in a democratic society should defer to legislative judgment.

³⁶L. HAND, *THE BILL OF RIGHTS* 73 (1958).

³⁷I would quarrel with his criticism of *Board of Educ. v. Barnette*, 319 U.S. 624 (1943). L. HAND, *supra* note 36, at 51.

³⁸Intending no disrespect, I doubt that either Douglas or Rehnquist (or for that matter, quite possibly any Justice currently sitting) would win a national election for the office of "Platonic Guardian."

cesses.³⁹ Of course, it is sometimes argued (though rarely in public) that the old Court contained "bad Platonic Guardians" because they were backward looking reactionaries whereas the *Roe* Court has "good Guardians" who are progressive and forward looking.⁴⁰ Apart from the fact that the Constitution was not written for only progressives, I submit that it is impossible to say with assurance what the future will hold. Undoubtedly, the *Lochner* majority believed that the principle of freedom of contract in labor negotiations would last till the heavens swallowed the earth. Similarly, we have no way of knowing whether ten years from now, abortion will not be more abhorred by society than it is today and that the value judgment of the *Roe* majority won't be rejected as much as we reject the *Lochner* value judgment today.⁴¹ Of course, I am not saying that this will happen, simply that we do not and cannot know that it would not.

To extricate themselves from the *Lochner* analogy, proponents of the *Roe* result sometimes argue that a sharp dichotomy should be drawn between economic rights and personal rights, and that the impropriety of judicial invalidation should be limited to the former.⁴² Although there is a good deal of surface attractiveness in this argument for a judge wishing to invalidate an abortion statute, it cannot survive close analysis. First of all, the terms "economic" and "personal" are far from clear in this context. Of course, most bakers who work more than sixty hours per week do so for economic reasons, and many women obtain abortions for personal reasons. But undoubtedly there are some bakers who would like to work more than sixty hours per week for personal self fulfillment and more than a few women who desire abortions for economic reasons. Thus, the economic-personal dichotomy will not work.

Does this mean that the Court must supinely accept all legislation as constitutional regardless of how outrageous it may be if it can find nothing other than substantive due process upon which to predicate a finding of unconstitutionality? The Court has so held⁴³ and there is a

³⁹*Lochner v. New York*, 198 U.S. 45 (1905) is as good an example as any.

⁴⁰At least for the *Roe* decision. It is possible, however, that some would question the consistency with which some members of the *Roe* majority could be characterized as "progressive and forward looking."

⁴¹Factors which conceivably could cause this include (1) a substantially reduced birth rate, (2) increasing ease of embryonic and fetal development outside of the womb, and (3) a more sophisticated understanding of prenatal development.

⁴²This position was advocated during oral argument by Roy Lucas, counsel for the plaintiffs, in *Corkey v. Edwards*, 322 F. Supp. 1248 (W.D.N.C. 1971). See also Note, *In Defense of Liberty: A Look at the Abortion Decisions*, 61 GEO. L.J. 1559, 1566 (1973).

⁴³See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963). Indeed, *Griswold v. Connecticut*, 381

good deal of force in this position.⁴⁴ Nevertheless, it seems to me that we do not concede the judiciary too much by permitting it to invalidate a statute that abridges a right which though not explicitly mentioned in the Constitution can fairly be categorized as fundamental.⁴⁵ It should be obvious that in this regard, the Court must be extremely careful to act with due humility⁴⁶ lest it turn its own predilection of good policy into a fundamental right. Probably the most thoughtful definition of fundamentality was delivered by Mr. Justice Goldberg in his *Griswold v. Connecticut* concurring opinion:

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principal is "so rooted [there] . . . as to be ranked as fundamental." The inquiry is whether a right involved "is of such a character that it cannot be denied without violating 'those fundamental principles of liberty and justice which lie at the base of all our institutions'"⁴⁷

Although this definition is helpful, it really doesn't tell a Justice how he is to ascertain things like "the traditions and collective conscience of our people." That answer is probably implicit in Holmes' dissent in *Lochner v. New York* where he argued

that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a *rational and fair man necessarily* would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁴⁸

With abortion laws as with maximum hour laws, "it does not need research to show that no such sweeping condemnation can be passed

U.S. 479 (1965), is susceptible to such an interpretation.

⁴⁴See particularly the dissenting opinions of Black and Stewart, JJ., in *Griswold v. Connecticut*, 381 U.S. 479, 507, 527 (1965).

⁴⁵Although not completely comfortable with this position, it seems to me to be less intolerable than any other alternative. Perhaps, it is implicit in the concept of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). Or, maybe the position can be justified by the philosophy behind the ninth amendment.

⁴⁶See *Rochin v. California*, 342 U.S. 165, 168 (1952).

⁴⁷381 U.S. at 493, *quoting* *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), and *Powell v. Alabama*, 287 U.S. 45, 67 (1932).

⁴⁸198 U.S. at 76 (emphasis added).

upon the statute before [the Court]."⁴⁹ It might be contended, however, that Holmes' dissent is unsound (notwithstanding Roe's "now vindicated" categorization of it) because there would hardly ever be a law that all rational and fair men would condemn. After all, legislators are not generally irrational, unfair or otherwise incompetent. Of course, one answer to this argument might be that the Court should not be invalidating laws on substantive due process grounds anyway.⁵⁰ I believe that a better answer is that occasionally a law will seriously impinge upon personal liberty for a reason which is itself constitutionally invalid. A good example is *Griswold v. Connecticut*⁵¹ where the purported justification for the Connecticut anti-contraceptive law was so ludicrous as to defy belief.⁵² One has to believe that the real reason for the law was a desire to prevent the employment of artificial devices to render sexual activity non-procreative even between married couples.⁵³ Obviously, this is reasonably related to enforcing a religious view held by a large number of Connecticut citizens.⁵⁴ However, no rational or fair man that I know or could imagine would find this to be a legitimate secular purpose.⁵⁵ Since there was no apparent reasonable purpose for what all must agree was a serious intrusion on marital privacy, I believe that the

⁴⁹*Id.*

⁵⁰See notes 43-44 and accompanying text *supra*.

⁵¹381 U.S. 479 (1965).

⁵²The State's argument as explained by Mr. Justice White was that forbidding marital use of contraceptive devices rendered it less likely that people would possess such devices for use in extramarital affairs, thereby deterring such affairs. It was not disputed, however, that contraceptive devices were readily available and that their sale for the prevention of disease appeared to be permissible. Thus, the State's interest was predicated on the possibility that a person not already deterred from adultery by the anti-adultery law would be deterred by the anti-use-of-contraceptive law notwithstanding the ready availability of such contraceptives. With classic understatement, Mr. Justice White declared this premise to be one "whose intrinsic validity is not very apparent." *Id.* at 507 (concurring opinion).

⁵³The Connecticut Supreme Court has not been entirely clear on this point, but in *State v. Nelson*, 126 Conn. 412, 424, 11 A.2d 856, 861 (1940), it did opine that "the Legislature might . . . reasonably hold that the artificial limitation on even legitimate child-bearing would be inimical to the public welfare. . . ."

⁵⁴This appears to be the position of the Catholic Church, PAUL VI, ON THE REGULATION OF BIRTH (Evangelical Letter 1968), whose members comprise about forty percent of the Connecticut population. See 1973-1974 STATESMAN'S YEAR BOOK 605 (110th ed. 1973), which lists the Roman Catholic population of Connecticut at 1,272,473. The Connecticut population recorded in the 1970 census was 3,032,217, 1973 WORLD ALMANAC 357.

I do not suggest, however, that this or any other religion was responsible for the original enactment of the law.

⁵⁵A statute which furthers a religious purpose will not be sustained unless it also furthers a secular purpose. *McGowan v. Maryland*, 366 U.S. 420 (1961).

Court reached the correct result in *Griswold*.⁵⁶ But, unless we are prepared to accept "Platonic Guardianism" run rampant, *Griswold* must be deemed to approach the outer boundary of proper judicial invalidation of a statute not explicitly nor implicitly forbidden by a specific constitutional provision.⁵⁷

There are several serious analytical defects in *Roe* and *Doe* which I have chosen not to develop because of the danger of obfuscating their most significant deficiencies.⁵⁸ There is, however, one especially troubling outgrowth of these cases with which I shall close this segment of the article, namely the willingness of members or future members of the legal profession to applaud the abortion cases for their result (substan-

⁵⁶I do not, however, believe that the Court's penumbral approach is sound. Unless the Court is suggesting that sexual intercourse is a penumbral form of speech (a suggestion it does not appear to be making), it is hard to see how the type of privacy involved in *Griswold* has anything to do with the specifics of the Bill of Rights. Indeed, the *Griswold* penumbral approach would seem to justify the *Lochner* result more than its own. After all, isn't the "right to make a contract" more closely related to the clause in article I, section 10, forbidding States to "pass any . . . Law impairing the Obligation of Contracts" than the right to use contraceptives is to the first, third, fourth or fifth amendments?

Professor Ely in an otherwise excellent article seems to suggest that *Griswold* is explicable on a fourth amendment rationale in that "enforcement would have been virtually impossible without the most outrageous sort of governmental prying into the privacy of the home." Ely, *supra* note 10, at 930 (emphasis deleted). This cannot justify the result in *Griswold*'s case since as to her, there was no unlawful search. If one cannot raise a fourth amendment claim when another is unconstitutionally searched, *Brown v. United States*, 411 U.S. 223 (1973), *a fortiori*, no such claim can be raised because another *might* be subject to such a search.

In my view, Justices Harlan and White, 381 U.S. at 499 and 502 respectively, who analyzed the problem in due process terms, wrote the soundest opinions in *Griswold*.

⁵⁷I am not calling for, nor do I support a Constitutional amendment to overturn *Roe* and *Doe*. Although I believe the Court egregiously erred in these cases, it is better to live with the error than to set a precedent for amending the Constitution to restrict liberty after the Court has spoken. An amendment here could lead to amendments in such areas as school integration, school prayer, and reapportionment. I believe that one of this nation's great strengths has been its unwillingness to amend away these liberties. I do not believe that it is worth departing from this sound course of conduct even to overturn decisions as wrong as *Roe* and *Doe*. I am especially opposed to any right to life amendment for fetuses. This would curtail legislative judgments in favor of maternal freedom which would be as unfortunate an interference with the public will as *Roe* itself was. See note 18 *supra*.

⁵⁸One analytical difficulty is the Court's unwillingness to allow medical regulations (other than that the operator be a licensed physician) during the first trimester. The fact that abortion at this time is safer than childbirth is irrelevant unless the Court is also holding that such regulations in regard to childbirth would be unconstitutional. Perhaps the theory is one of equal protection in that childbirth is not in fact so regulated. Even so, however, this is an area where States have traditionally had the maximum latitude under equal protection as well as due process. See, e.g., *Williamson v. Lee Optical Co.* 348 U.S. 483 (1955). But cf. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

For further comments on the deficiencies of *Roe*, see Ely, note 10 *supra*.

tially free abortion) while at the same time recognizing, but relegating to relative insignificance, the insubstantiality of their doctrinal base.⁵⁹ I don't suppose that this is the first time expediency has ever prevailed over principle⁶⁰ nor is it likely to be the last.⁶¹ Yet, this truism scarcely makes it more palatable. Indeed, although the cause of civil liberty was perhaps the "winner" this time,⁶² there is no guarantee that this will always be so. The Court has recently invalidated (though not on this theory) a law designed to extend the franchise to eighteen year olds,⁶³ and our current President is hardly making devotion to libertarianism a criterion for Court membership.⁶⁴ Thus it seems clear that it was "Platonic Guardianism" and not libertarianism that ultimately prevailed in *Roe*. And for those libertarians who cannot see a difference, just remember who's appointing the "Guardians."

OBSCENITY CASES

Like the abortion cases, the five obscenity cases⁶⁵ reflect good intentions, though of a different sort.⁶⁶ Unfortunately, they also mirror the Court's willingness to substitute its wisdom for values fairly inferable from the Constitution.⁶⁷

Prior to these decisions, the criteria for determining obscenity (all

⁵⁹A recent article defending *Roe* is entitled: *The Forest and the Trees*, see Heyman & Barzelay, note 17 *supra*. This metaphor, though a bit hackneyed, expresses my concern very well. No matter how beautiful the tree of substantially free abortion (or how wonderful its fruit in alleviating human suffering) may be, it is not worth planting if to do so would destroy the entire forest of principled judicial analysis. Of course, this observation is not directed at the authors of "The Forest and the Trees" who have made an important contribution to the overall understanding of *Roe v. Wade* by their scholarly (though in my view, erroneous) analysis.

⁶⁰Arguably, the process (at least in constitutional law) began with *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶¹Indeed, the President of the United States has practically made devotion to the expedient of aiding the "peace forces . . . to protect the innocent from criminal elements" a prerequisite for membership on the Court. See Ely, *supra* note 10, at 945-46.

⁶²Maternal, if not fetal.

⁶³*Oregon v. Mitchell*, 400 U.S. 112 (1970), invalidating that portion of the Federal Voting Rights Law that purported to extend the franchise to eighteen year olds in State elections. Of course, this decision has been effectively overturned by the twenty-sixth amendment.

⁶⁴See note 61 *supra*.

⁶⁵*Miller v. California*, 93 S. Ct. 2607 (1973); *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628 (1973); *United States v. 12-200 Ft. Reels of Super 8 MM. Film*, 93 S. Ct. 2665 (1973); *United States v. Orito*, 93 S. Ct. 2674 (1973); *Kaplan v. California*, 93 S. Ct. 2680 (1973).

⁶⁶The desire "to maintain a decent society". *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2636 (1973).

⁶⁷Perhaps somewhat more justifiably than *Roe* in light of the *Roth v. United States*, 354 U.S. 476 (1957), precedent. See notes 71-76 and accompanying text *infra*.

of which needed to coalesce) were

that (a) the dominant theme of the material taken as a whole [appeal] to a prurient interest in sex; (b) the material [be] patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material [be] utterly without redeeming social value.⁶⁸

The new obscenity cases, specifically *Miller v. California*, altered the tests to

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious serious literary, artistic, political, or scientific value.⁶⁹

Before evaluating the impact and wisdom of these changes, it is helpful to consider that which the Court did not change, viz: its self-created doctrine that obscenity is not speech. While normally adherence to precedent is not the sort of judicial conduct that warrants comment, here the Court was employing these cases as vehicles for reconsideration of the entire obscenity question.⁷⁰

The "obscenity is not speech" doctrine originated in *Roth v. United States* wherein the Court opined that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."⁷¹ Although *Roth* is not the only case where the Court credited (or blamed) history for a result the court itself officially pronounced for the first time many years later,⁷² the paucity of its historical documentation was appalling. It referred to a highly ambiguous letter written by the Continental Congress to the inhabitants of Quebec in 1774⁷³ and to state anti-obscenity laws enacted after the first

⁶⁸"Memoirs" v. Massachusetts, 383 U.S. 413, 418 (1966).

⁶⁹93 S. Ct. at 2615.

⁷⁰"This is one of a group of 'obscenity-pornography' cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called 'the intractable obscenity problem.' " *Id.* at 2610.

⁷¹354 U.S. 476, 484 (1957).

⁷²See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969).

⁷³The letter said:

The importance of this [freedom of the press] consists of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential

amendment was adopted but before it became applicable to the states.⁷⁴ This insubstantiality of historical documentation was exacerbated by the Court's failure to mention the countervailing historical evidence suggested by Judge Frank in the Second Circuit's treatment of the *Roth* case.⁷⁵ Lack of direct historical support, of course, does not preclude a determination that obscenity is not constitutionally protected speech. It does, however, impose an obligation on those who would so hold to proffer some other justification. *Roth* gave us virtually none.⁷⁶

There was good reason to believe that the *Roth* "obscenity is not speech" doctrine had been overruled in *Stanley v. Georgia*, where the Court held that *Roth* did not apply to the viewing of obscenity in the privacy of one's home.⁷⁷ In the course of its opinion, the Court emphasized that first amendment rights were involved and that the State could not punish Stanley without some justification sufficient to outweigh Stanley's first amendment claim. To Georgia's argument that it had a legitimate interest in protecting the individual's mind from the effects of obscenity, the Court issued this ringing denunciation:

We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts. To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment . . . Nor is it relevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all.⁷⁸

promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.

354 U.S. at 484.

⁷⁴The statutes and cases cited by the Court range from 1800 to 1843. *Id.* at 484-85 n.13. Of course, the first amendment was clearly not applicable to the states prior to the adoption of the fourteenth amendment in 1868, (see *Barron v. Baltimore*, 32 U.S. (7 Pet.) (1833)) and probably was not applicable to them prior to *Gitlow v. New York*, 268 U.S. 652 (1925).

⁷⁵237 F.2d 796, 806-09 (2d Cir. 1956) (concurring opinion). Judge Frank appears to indicate that at least Franklin, Jefferson and Madison believed that the first amendment protected obscenity.

⁷⁶It did refer to dicta from prior Supreme Court opinions and to the pervasive presence of anti-obscenity laws throughout this and other nations.

⁷⁷394 U.S. 557 (1969).

⁷⁸*Id.* at 565-66. *Stanley* was undercut by *United States v. Reidel*, 402 U.S. 351 (1971), which upheld a conviction for distributing obscenity through the mail to an adult who had requested it. In the course of its *Reidel* opinion, the Court explicitly reaffirmed *Roth*.

Regardless of result, the *Stanley* approach is inherently sounder than *Roth* because it requires the Court to evaluate the substantiality of the State's justification for interfering with the first amendment, an evaluation which the Court specifically refused to undertake in *Roth* because of its conclusion that there was no first amendment interest to balance against the State's desire to suppress obscenity.⁷⁹ Although the *Miller* quintology did reaffirm *Roth*, it seemed somewhat more willing than *Roth* to evaluate the state's interest. Specifically, in *Paris Adult Theatre I v. Slaton*, the Court alluded to the protection of "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself."⁸⁰

While it is hard to quarrel with the Court's conclusion that these reasons are sufficient to justify suppression of obscenity so long as obscenity is not speech, it seems unlikely that a similar conclusion would have been reached had the Court held obscenity to be speech. The public safety argument, based on the theory that exposure to obscenity might cause crime, is undercut by the fact that there is substantial opinion among behavioralists that obscenity does not cause crime, and, indeed, some such opinion that it actually retards crime.⁸¹ Although when dealing with matters which are outside the ambit of the first amendment, the legislature is free to choose its theorist,⁸² this freedom does not extend to legislation touching upon the "preferred" first amendment. Where free speech is implicated, the State must do more than show that a minority of theorists believe that obscenity increases crime and that it chooses to believe that minority.⁸³ The quality of life, community environment, and tone of commerce arguments boil down to little more than group umbrage at the pervasive presence of obscenity. Not only would this condition not be a sufficient interest to outweigh the first amendment, but it is the very condition that freedom of speech was designed to create. Undoubtedly, the mass civil rights demonstrations of the sixties were felt by many to be terribly umbrageous. Yet the Court refused to sustain a breach of peace conviction against a civil rights

⁷⁹354 U.S. at 486-87. For a further discussion of the unsoundness of this approach, see Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81 (1967).

⁸⁰93 S. Ct. at 2635.

⁸¹See Loewy, *supra* note 79 at 90-95; cf. REPORT OF COMMISSION ON OBSCENITY AND PORNOGRAPHY 26-27 (1970).

⁸²"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). Indeed, until *Roe v. Wade*, nothing in the Constitution incorporated Jane Roe's social ethics.

⁸³See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

leader who led a demonstration of 1,500 blacks in a predominantly white business section of Baton Rouge, Louisiana.⁸⁴

Although there are other reasons for controlling obscenity such as protection of minors and privacy, it is clear that the obscenity statutes at bar were not narrowly drawn with a view towards protecting only those interests.⁸⁵

Turning to the Court's new tripartite test, there does not seem to be much difference from the *Roth-Memoirs* standard in the first or "prurient interest" part of the test. The Court still has not explained why an appeal to the "prurient interest"⁸⁶ is less worthy than an appeal to an interest in excessive bloodshed, an appeal which the Court held to be constitutionally protected in *Winters v. New York*.⁸⁷ Nor has it shown how this phrase is any less vague than "collections of criminal deeds of bloodshed or lust . . . 'so massed as to become vehicles for inciting violent and depraved crimes against the person' " which was held unconstitutionally vague in *Winters*.⁸⁸ Two changes that the Court did make in this part of the test were (1) to insert the phrase "contemporary community standards" (formerly in the "patently offensive" part of the test) and (2) to indicate that the standards need not be national, but can be local.⁸⁹ At this juncture, it does not appear possible to assess accurately the impact of these changes.⁹⁰

To the Court's credit, it did attempt to remedy the vagueness of the "patently offensive" segment of the test by requiring the legislature or judiciary of a State to specifically define the type of sexual conduct that people are forbidden to depict or describe in a patently offensive way. Unfortunately, this does not get at the heart of the vagueness

⁸⁴Cox v. Louisiana, 379 U.S. 536 (1965).

⁸⁵For a discussion of the sufficiency of these interests, see Loewy, *supra* note 79, at 90-106.

⁸⁶For various definitions of "prurient," see *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957).

⁸⁷333 U.S. 507 (1948).

⁸⁸*Id.* at 513. Neither the phrases "average person," "contemporary community standards," nor the phrase "taken as a whole" render "prurient interest" significantly less vague.

⁸⁹Since no opinion of the Court had ever explicitly required the standards to be national, it is arguable that this does not constitute a change.

⁹⁰One ruling which the Court made explicit for the first time was that expert testimony is not a constitutional prerequisite to a determination of obscenity. *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2634-35 (1973). Hopefully, this will at least reduce the tremendous misallocation of citizens' time. To give just one egregious example, in Georgia's abortive effort to convict Robert Stanley of possession of an obscene film *in the privacy of his home*, the State availed itself of the services of a pastor, a service station attendant, two assistant solicitors general, a retired locomotive engineer, an optometrist, and a real estate salesman to show that the film contravened "contemporary standards." *Stanley v. Georgia*, 394 U.S. 557 (1969) (Transcript 105-18).

problem. A movie producer may know that he cannot depict sexual intercourse in a patently offensive way, but he does not know whether a court or jury will find a given depiction patently offensive. Thus, his natural course of action would be to avoid any depiction of sexual intercourse at all, thereby eliminating protected as well as unprotected speech.⁹¹

The Court's rejection of the "utterly without redeeming social value" test is, in terms of practical impact, the most devastating blow to free expression in these decisions. To be sure, the "redeeming social value" test had its deficiencies. First of all, it totally ignored the value inherent in obscenity itself.⁹² Secondly, it forced publishers of "dirty books" to put a bunch of scientific or pseudo-scientific textual materials into the books so that they could be sold to people who just wanted to look at "dirty pictures."⁹³ Finally, the test required the Court to pass on social importance. Apart from the time consuming nature of this task, the Court is simply not qualified to perform it. Being composed of fallible human beings, the Court necessarily runs the risk of being unable to discern social value where social value may exist. Such a risk should not be run unless there is a compelling reason to do so, a condition which is noticeably absent from the obscenity area.⁹⁴ Despite

⁹¹Cf. *Winters v. New York*, 333 U.S. 507, 519 (1947). Of course, I am aware that there has not been excessive reluctance by authors and movie producers to depict sexual intercourse. However, a producer who knows that his material will be saved if it has the "slightest redeeming social value" probably will not be very concerned with the vagueness of a separate test which he does not have to meet. With "redeeming social value" removed, however, "patent offensiveness" becomes more important as a criterion for determining the obscenity *vel non* of a book or movie.

⁹²It obviously has entertainment value for those who enjoy this sort of thing. Furthermore, some behavioralists believe that reading erotic literature, including obscenity, has a beneficial psychological effect on the reader. See, e.g., E. KRONHAUSEN & P. KRONHAUSEN, *PORNOGRAPHY AND THE LAW* 273-74 (1959). Of course, the Court doesn't have to believe people like the Kronhausens. But, as I have written elsewhere,

when respectable psychiatric opinion suggests that obscenity has importance, the Court should not deny it constitutional protection on the ground that it is "utterly without redeeming social importance." Rather, the Court should recognize that obscenity *might* have social importance and in a free society, where speech has a "preferred position," no utterance which might have social importance should be denied constitutional protection in the absence of a compelling state interest.

Loewy, *supra* note 79, at 87.

⁹³This may not sound like a worthy interest to protect, but the first amendment is not limited to worthy interests. Of course, a person just wishing to read the text of such a scientific work has to pay a grossly inflated price for it because it contains a bunch of "dirty pictures" that he doesn't want.

⁹⁴As the Court said in *Winters*:

The line between the informing and the entertaining is too elusive for the protection of

these deficiencies, the "redeeming social value" test did have one important virtue. If the work had any recognizable value at all, it could not be condemned to the fire.⁹⁵ Thus, the situation under this test was not very different from what it would have been had the Court opted for an "obscenity-is-constitutionally-protected-speech" rule.⁹⁶ The situation will probably be quite different under the new test. To begin with, not all value will suffice. In order to save the work, the value must be "literary, artistic, political, or scientific."⁹⁷ Moreover, this value must be serious. Hence, a judicial determination that the political satire in a movie such as "I Am Curious (Yellow)" is not "serious" could condemn that work. In addition, this "serious value" must permeate the work as a whole. Presumably, therefore, a work could have "serious literary or artistic value" for a portion of it and yet be doomed because of its failure to maintain that value "taken as a whole." But the most significant deficiency of the new test is that it rejects the very doctrinal foundation upon which the "obscenity is not speech" rule was predicated. It is one thing to say that speech with "utterly no redeeming social value" is not protected by the First Amendment. It is quite another to say that speech with social value is not protected because the value isn't great enough to measure up to a Court imposed standard.⁹⁸

Mr. Justice Brennan emerges from these decisions as a tragic figure not unlike the legendary Baron Von Frankenstein. Decrying the Court's

[freedom of the press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.

333 U.S. at 510. Candor compels the disclosure that via dictum the Court did except obscenity from these libertarian sentiments. It did not, however, even attempt to justify this exclusion beyond its characterization of "obscene, lewd, lascivious, filthy, indecent or disgusting" as "words well understood through long use in the criminal law" (*id.* at 518), a characterization, which to say the least, has not withstood the test of time.

⁹⁵*But cf.* *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972), where the Court said that "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication."

⁹⁶With two unfortunate exceptions: First, the conviction of Ralph Ginzburg, *Ginzburg v. United States*, 383 U.S. 463 (1966), which I have criticized elsewhere, Loewy, *The Warren Court As Defender of State and Federal Criminal Laws*, 37 GEO. WASH. L. REV. 1218, 1220-23 (1969), and secondly, the terrible misallocation of judicial, prosecutorial, police, defense lawyer, and citizen resources necessary to attempt to enforce an anti-obscenity law. See note 90 *supra*.

⁹⁷Noticeably absent from the new test is "historical value" which helped save "Fanny Hill." *"Memoirs" v. Massachusetts*, 383 U.S. 413, 419 (1966) (plurality opinion of Brennan, J.).

⁹⁸See *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2654 (1973) (dissenting opinion of Brennan, J.).

continued adherence to the "obscenity is not speech" doctrine, he was unable to cage the monster he had created. And create it he did. Practically every major formative obscenity opinion was written by Brennan.⁹⁹ Yet, had he, along with Mr. Justice Stewart,¹⁰⁰ recognized the inherent intolerable vagueness in any of the obscenity tests (the basis of Brennan's dissent which Stewart joined)¹⁰¹ prior to Mr. Justice Black's death, they (Brennan and Stewart) could have joined with Justices Black, Douglas and Marshall¹⁰² to hold that obscenity is speech. Nevertheless, Brennan, who wrote the dissent, and to a lesser extent, Stewart, who joined it, are to be commended for their new-found efforts to evaluate the role of obscenity under the first amendment, free of the emotional revulsion that one often senses in discussion of this subject. Who knows, maybe some day the monster finally will be caged.¹⁰³

ABORTION CASES VIS-A-VIS OBSCENITY CASES

Even if one could accept the abortion cases, the obscenity cases, or both standing alone, they are totally irreconcilable when compared one with the other.

First of all, let us consider the source of the respective rights. The right to abortion is said to be part of the right to privacy¹⁰⁴ which is found in the due process clause of the fourteenth amendment. Presuma-

⁹⁹E.g., *Roth v. United States*, 354 U.S. 476 (1957); *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (plurality opinion); *"Memoirs" v. Massachusetts*, 383 U.S. 413 (1966) (plurality opinion); *Ginzburg v. United States*, 383 U.S. 463 (1966).

¹⁰⁰Justice Stewart, though not as instrumental as his brother Brennan in perpetuating the obscenity myth, surely did his share. Although conceding that the term obscenity (or his synonym for it, "hardcore pornography") may be undefinable, he was prepared to "know it when [he] see[s] it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In *Ginzburg v. United States*, he suggested that "[t]here does exist a distinct and easily identifiable class of material in which all of these elements [of obscenity] coalesce." 383 U.S. 463, 499 (1966) (Stewart, J., dissenting) (emphasis added).

¹⁰¹93 S. Ct. at 2642.

¹⁰²Although Mr. Justice Marshall (who joined Brennan's opinion in *Paris Adult Theatre I*) had not clearly taken this position in prior cases, his opinion for the Court in *Stanley v. Georgia*, 394 U.S. 557 (1969), coupled with his narrow concurrence in *United States v. Reidel*, 402 U.S. 351, 360 (1971), suggest that he was prepared to so hold.

¹⁰³As with the abortion cases, I have chosen to focus on only the most significant deficiencies of the obscenity cases. Among other unfortunate aspects of these decisions were the holding in *United States v. Orito* that the right to view obscenity did not include the right to transport an obscene film in interstate commerce, 93 S. Ct. at 2674, and the willingness in *Kaplan v. California* to allow words as well as pictures to be deemed obscene.

¹⁰⁴I am willing to assume this *arguendo*, although it seems unsound. See text accompanying notes 9-13 *supra*.

bly the right got there because of its penumbral relationship to various specific provisions of the Bill of Rights.¹⁰⁵ The right to distribute obscenity, on the other hand, arguably comes from the first amendment. Even accepting the Court's premise that obscenity is not technically speech, it is surely no more than a thin and vague line away from being speech. Clearly, the right to obtain an abortion is less directly related to or deeper in the penumbras of the Bill of Rights than the privilege to publish or distribute words or pictures that appeal to the prurient interest, are patently offensive, and lack serious literary, artistic, political, or scientific value. Yet in *Roe*, the Court emphasized that the state's interest in precluding abortions must be compelling and that it was not permitted to adopt that the theory of life which overrode the rights of the pregnant woman.¹⁰⁶ But in *Paris Adult Theatre I*, the Court emphasized that since anti-obscenity legislation did not impinge "upon rights protected by the Constitution itself", the state was perfectly free to act upon unproven assumptions.¹⁰⁷

When we examine the respective state interests, it seems clear that the anti-abortion interests outweigh the anti-obscenity interest. However much one may value or not value embryonic life, it is at least a tangible physical interest whose existence is a biological fact. The reasons for condemning obscenity on the other hand are much more ethereal. Besides, who's to say that "the quality of life and total community environment" are not as adversely affected by people's awareness of abortion as it is by their awareness of obscenity. Is the Court to take judicial notice of the "fact" that people get more upset with "dirty movies" than with destruction of embryos or fetuses? If the permissive society might lead to perversion of moral values and increased crime, isn't it possible that a society which allows nearly free abortion will come to have less respect for the sanctity of human life? I surely do not suggest this is the case, but if speculative reasons can allow a state to outlaw obscenity, why cannot reasons of similar quality permit it to

¹⁰⁵At least, that was the *Griswold* theory. As deep in the penumbras as the right-to-contraception aspect of privacy is (see note 56 *supra*) the right-to-abortion aspect of privacy is even further removed from the specific provisions of the Bill of Rights.

¹⁰⁶See text accompanying note 24 *supra*.

¹⁰⁷93 S. Ct. 2636-37. In a footnote to the quoted statement, the Court quoted Mr. Justice Holmes, concededly in another context, as saying: "[T]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Id.* at 2637 n.11.

outlaw an abortion?

Is there any way that these cases can be reconciled? A colleague of mine, in a moment of levity, has suggested that they are reconcilable only on the ground that the Court is so opposed to sex that it not only wants to prevent people from seeing it or reading about it, but it wants them to be able to erase the evidence that they ever participated in it.¹⁰⁸ More seriously, I believe that both decisions are a product of constitutional subordination to personal whims.¹⁰⁹ The Justices do not like anti-abortion laws, but they do like anti-obscenity laws. Thus, they have created a right to abortion on the one hand, and an exception to the first amendment on the other. Surely, the late Mr. Justice Black would have been appalled at these decisions.¹¹⁰ Unlike him, I do not agree that the words of the Constitution should end analysis in difficult cases.¹¹¹ I do, however, think that they do, or ought to, *begin* analysis. Let us hope that these cases are aberrational and that in resolving future constitutional problems, the Burger Court will regard the Constitution as at least a relevant starting point.

¹⁰⁸The colleague wishes to remain anonymous.

¹⁰⁹Perhaps unconsciously, they reflect the upper middle class ethic that nice people don't read obscenity, but if one's daughter gets pregnant, an abortion is O.K.

¹¹⁰See *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting); *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Black, J., concurring).

¹¹¹This would be the ultimate "strict constructionist" position.

